

## Prior Inconsistent Statements and Collateral Matters

No federal rule of evidence specifically states that prior inconsistent statements are admissible for impeachment. Rule 613, like many similar state rules, assumes that prior inconsistent statements are an accepted and traditional form of impeachment and provides certain procedures for using such statements. There is nothing in the Federal Rules or most state rules that specifically states that a trial judge may exclude prior inconsistent statements that relate to collateral matters. But the basic rules on relevance and balancing probative value against waste of time—Federal Rules of Evidence 401, 402, and 403—permit the exclusion of any evidence that is either irrelevant or that lacks sufficient probative value to warrant the time it would take to present it.

### *United States v. Bolzer*

*United States v. Bolzer*, 367 F.3d 1032 (8th Cir. 2004), offers a useful reminder of the discretion that trial judges have to admit or exclude prior inconsistent statements. The Eighth Circuit affirmed a defendant's convictions for second-degree murder and use of a firearm during a crime of violence. It held that the trial judge did not abuse discretion in excluding impeachment evidence directed at an FBI agent. The agent testified on direct examination that he transferred from one FBI office to another because his wife wanted to move. The defense contended that the transfer was attributable to the agent's problematic relationship with a federal judge in the first location. The defense contended that the agent was so upset with the judge that he used improper language to describe him in a conversation with a court employee.

The defense theory was that the agent's explanation of his transfer was inconsistent with his

statement to the court employee, and that the statement to the court employee should therefore be admitted to impeach the agent's credibility. The government contended that the statement to the employee was collateral and irrelevant. The trial judge agreed and excluded the statement. The court of appeals affirmed.

### Relevance?

Any time a witness makes inconsistent statements, the statements arguably are relevant to credibility. Inconsistent statements may reflect dishonesty, uncertainty, or confusion. The problem, however, is that almost no one is entirely consistent, and if courts permitted cross-examiners to explore all inconsistent statements made by all witnesses on all subjects then trials might be endless. Courts predictably are unwilling to explore all of the statements made by all witnesses in any and all circumstances and are almost certain to exclude inconsistent statements that they perceive to be collateral. The key question, of course, is what is collateral?

### What is collateral?

The court of appeals reasoned in *Bolzer* that "[t]he relevant issue under Rule 613(b) is not whether there is some material issue that would be affected in some way by the admission of the prior inconsistent testimony, but rather whether the precise subject of the prior inconsistent testimony is material." Parsing the court's language helps to explain the difference between collateral and non-collateral statements. When the court says that the question is not whether some material issue would be affected in some way by the admission of evidence of a prior inconsistent statement, it is recognizing that all prior inconsistent statements arguably are relevant to credibility. All prior inconsistent statements, therefore, might be relevant to the issues in dispute in any case in which the credibility of witnesses matters (which is most cases). And no court is going to admit all inconsistent statements of all witnesses. In sum, it is not enough that a prior inconsistent statement may be relevant to the credibility of a witness, which in turn is relevant to facts in dispute. Instead, the prior inconsistent statement itself must involve disputed issues to avoid the collateral label.



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Thus, the court concluded that the agent's prior statement to the court employee had no substantive connection to the murder trial, and therefore "any tendency of that prior statement to call Weir's [the agent's] credibility into question is irrelevant for Rule 613(b) purposes." The court's reasoning was straightforward: The trial was about whether the defendant committed murder and used a weapon, not about why the agent was in one FBI office rather than another.

If the agent had testified at trial that he had seen the defendant with a gun and had made a pretrial statement to someone saying that the defendant did not have a gun, the "precise subject" of the prior inconsistent statement, in the court's view, would clearly be directly related to the issues being tried. The difference between the facts of *Bolzer* and this hypothetical is that the agent in *Bolzer* had made no statement about the murder, the gun, or Bolzer. Instead, he made a statement about a judge in a different locale, and neither the judge nor the locale had any relevance to the charges against Bolzer. Thus, contradicting the agent's direct testimony shed light only on whether his statement about why he was transferred was accurate and/or complete. The prior statement might have had some limited probative value as to the agent's credibility, but it did not directly contradict the allegations made about what the defendant did or the defendant's intent.

### Judgment call

When prior inconsistent statements that appear to be collateral are offered, the trial judge has a judgment call to make. No judge is going to admit all prior inconsistent statements made by all witnesses. Trials would never end if all such statements were admitted, and multiple inconsistent statements might overwhelm and confuse a jury as to what issues really matter in a case. But some prior inconsistent statements are so devastating to credibility that they ought to be admitted because, if the jury concludes that a witness uttered a blatant lie in its presence or made a major mistake, the jury might well conclude that the witness is unworthy of belief. Suppose, for example, that an FBI agent had told good friends that he/she was a state college graduate with a bachelor's degree, but later testified on direct examination that he/she was a graduate of West Point with a master's in biology. Might such inconsistency cause reasonable jurors to discount all of the agent's testimony? At common law, judges had some discretion to permit

impeachment on collateral matters when the impeachment was so highly probative of credibility that its impeachment value outweighed any of the dangers of admitting the testimony. In evidence regimes like the Federal Rules of Evidence, the trial judge balances probative value against various dangers, including waste of time and confusion. In the end, the trial judge makes a judgment call as to the importance of the impeachment evidence. A federal judge could decide in the above example that a jury could well conclude that, if the agent lied about these things on direct examination, the remainder of the agent's testimony would be viewed with considerable skepticism. At bottom, the question is whether the inconsistent statement (or other evidence that would contradict the agent's testimony about educational achievement) so powerfully attacks credibility that it should be admitted even though the precise subject matter of the statement is not relevant to the issues in dispute.

### Opening the door

Arguably, it might make a difference whether a prior inconsistent statement is offered to contradict testimony elicited on direct examination as opposed to testimony elicited on cross-examination. If the subject is important enough to delve into on direct examination, the cross-examiner has an argument that fairness requires an opportunity to rebut the testimony the direct examiner deliberately injected into the case. But if the cross-examiner chooses to ask questions on a collateral issue and is unsatisfied with the witness's answers, the argument for impeachment or rebuttal is weaker. It is weaker because the direct examiner sought no advantage by exploring the collateral matter, and it is doubtful that any unfavorable answers to questions not specifically related to the issues in dispute damaged the cross-examiner to any great extent.

In *Bolzer*, it was the prosecutor who injected the transfer and its reasons into the case. Why the prosecutor did so is unclear—perhaps to create the impression of a successful agent. This may have been a form of character evidence offered to bolster the agent's credibility (which could have been the subject of a successful objection). If so, the defense (which either did not recognize that the testimony might have been objectionable or decided not to object in order to be able to cross-examine) had a strong claim to be able to correct the impression the prosecutor sought to create. After all, the direct examiner has no right to suggest something to the jury that is false in order to bolster the credibility of a witness.

Had the defendant objected that the reasons for the transfer were irrelevant or that the prosecutor was attempting to improperly bolster the agent's testimony, the trial judge might well have sustained the objection and barred any testimony about why the agent was in one office rather than another. But, neither lawyers nor judges are perfect. Objections are overlooked or strategic decisions are made in the heat of trial with little time to contemplate all the ramifications of the decisions. Defense counsel might not have appreciated what the prosecutor was trying to do when the transfer testimony was elicited on direct examination. Or defense counsel might have appreciated the prosecutor's intent and decided that, if the prosecutor wanted to pursue the matter, the defense was willing to do so also. The key

point is that once the prosecutor injects a fact into the case, collateral or not, the defense has an argument that it should be able to respond to that fact.

### Conclusion

Trial judges retain considerable latitude under most evidence rules to strike a balance between the impeachment value of prior inconsistent statements and the danger of wasting time by inquiring into collateral matters. There is no bright line rule admitting or excluding prior inconsistent statements. The case for expanded impeachment, even as to collateral issues, is stronger when the direct examiner has injected an issue into the case and weaker when the cross-examiner wishes to impeach testimony that he/she elicited. ■

## SECTION ACCEPTING 2005-06 NOMINATIONS

The Criminal Justice Section's Nominating Committee will meet on February 12, 2005, to nominate members for Council and officer positions for terms beginning in August 2005. Candidates will be selected to fill the vacancies for the following offices:

### OFFICERS:

**VICE-CHAIR FOR PLANNING:** A one-year term for 2005-06 that succeeds the Chair-Elect in 2006-07 and the Section Chair in 2007-08.

**VICE-CHAIR FOR GOVERNMENTAL AFFAIRS:** A one-year term for 2005-06.

**VICE-CHAIR FOR CONTINUING LEGAL EDUCATION:** A one-year term for 2005-06.

**VICE-CHAIR FOR PUBLICATIONS:** A one-year term for 2005-06.

**SECTION DELEGATE:** A three-year term for 2005-08.

### COUNCIL MEMBERS:

- Five Council member positions, each for a three-year term.
- One Council member position for a one-year term. This individual must be under the age of 36 as of August 7, 2005.

Nominations for consideration by the committee should be submitted by Friday, January 14, 2005, to Thomas C. Smith, Section director, at the ABA Criminal Justice Section, 740 15th Street, N.W., Washington, D.C., 20005.